NO. 89-866

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

STATE OF CONNECTICUT, petitioner

v.

MICHAEL D'AMBROSIA, respondent

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF CONNECTICUT

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DECEMBER 27, 1989

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2. Did the Connecticut Supreme Court, which held for the defendant on state constitutional grounds as well as on the basis of federal due process as stated in Pennsylvania v. Ritchie, establish a burden of proof that is contrary to the holding of Ritchie?

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent Michael D'Ambrosia respectfully requests the Court to deny the petition for a writ of certiorari, seeking review of the Connecticut Supreme Court's opinion.[1] That opinion was decided on July 4, 1989, and is reported as State v. D'Ambrosia, 212 Conn. 50, 561 A.2d 422 (1989). The decision of the Connecticut Appellate Court is reported at 14 Conn. App. 309, 541 A.2d 880 (1988).[2]

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1 All parties to the proceeding are named in the caption of this case.

2 Hereinafter, citation to the case is to the pages of the petitioner's appendix, Pet. App. at 1A-15A, and to the decision in the Connecticut Appellate Court, Pet. App. at 16A-30A.

STATUTORY PROVISIONS INVOLVED

CONNECTICUT GENERAL STATUTES

Sec. 52-146e. Disclosure of communications. (a) All communications and records as defined in section 52-146d shall be confidential and shall be subject to the provisions of sections 52-146d to 52-146j, inclusive. Exception as provided in sections 52-146f to 52-146i, inclusive, no person may disclose or transmit any communications and records or the substance or any part or any resume thereof which identify a patient to any person, corporation or governmental agency without the consent of the patient or his authorized representative.[3]

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise, infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory

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3 The respondent relies on the statutes as they appear in petitioner's appendix at Pet. App. 31A-38A.

process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF CONNECTICUT

ARTICLE 1, SECTION 8

Sec. 8. In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel; to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process to obtain witnesses in his behalf; to be released on bail upon sufficient security, except in capital offenses, where the proof is evident or the presumption great; and in all prosecutions by indictment or information, to a speedy, public trial by an impartial jury. No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law, not shall excessive bail be required nor excessive fines imposed. No person shall be held to answer for any crime, punishable by death or life imprisonment, unless on a presentment or an indictment of a grand jury, except in the armed forces, or in the militia when in actual service in time of war or public danger.

STATEMENT OF THE CASE

The respondent relies upon the facts as stated by petitioner, pages 4-7, with the addition of the following supplemental facts.

Albert Knous, the witness whose records were at issue, was a co-defendant who cooperated with the prosecution and testified against the respondent. Following Knous' direct testimony before the jury, defense counsel was precluded by the trial court from questioning Knous regarding his mental problems, the nature of

the problems for which he received treatment, and the basis of recommendations for referral to a halfway house.

The trial court sustained the prosecution's objections to these questions despite the fact that the witness, Knous, had at no time asserted any claim of privilege or confidentiality of the information. Although the prosecutor objected to those lines of inquiry and maintained that defense counsel had not made a sufficient showing to require disclosure of confidential records, he requested that the trial court determined whether the witness would waive his privilege so that the court could make an in camera inspection of the records. The court denied the prosecutor's request.

REASONS WHY PETITION SHOULD BE DENIED

THE CONNECTICUT SUPREME COURT IN STATE V. D'AMBROSIA, DID NOT HOLD THAT A DEFENDANT IS ENTITLED UNDER THE FEDERAL RIGHT TO CONFRONTATION TO DISCOVER INFORMATION CONTAINED IN CONFIDENTIAL RECORDS, CONTRARY TO PENNSYLVANIA V. RITCHIE.

A. The Connecticut Supreme Court did not rule that the defendant was entitled to discover information contained in confidential records.

In the present case, the Connecticut Supreme Court ruled that the trial court had denied defense counsel sufficient opportunity to voir dire a key witness, and remanded for further preliminary proceedings. The Connecticut Supreme Court, however, clearly made no decision as to whether the defendant would ultimately be afforded access to confidential records. Indeed, that Court did not even reach the issue of the necessity for in camera judicial review. In its narrow decision, the Connecticut Supreme Court merely held that the defendant must be afforded

some greater latitude in questioning in his attempt to establish the threshold requisite for an in camera inspection by the trial court, and remanded the case for that purpose.

In the present posture of the case as decided by the Connecticut Supreme Court, it can only be speculated as to whether the witness will waive his privilege at relevant stages of the proceedings on remand, or whether defense counsel will elicit information which will mandate an in camera review. Whether that review will ultimately afford the defendant access to the witness' records is a question several stages removed from the current status of this case.

The decision in State v. D'Ambrosia is a narrow opinion, limited to its facts. The failure of the trial court to allow defense counsel sufficient latitude on cross-examination in order to establish whether judicial in camera review is warranted was the sole issue ruled on by the Connecticut Supreme Court. Contrary to the petitioner's construction of its decision, the Connecticut Supreme Court in this case decided only that the defendant should be given a fair opportunity to make a preliminary showing necessary for any in camera inspection. Pet. App. 12A. See also State v. Whitaker, 202 Conn. 259, 520 A.2d 1018 (1987), cited at Pet. App. 14A.

B. In an unbroken line of cases interpreting Connecticut General Statutes 52-146e, the Connecticut Supreme Court has employed a balancing procedure which comports with the due process standard of Pennsylvania v. Ritchie.

The statutes at issue in this case differ from the Pennsylvania statute, in that a witness' consent must be secured

prior to the privilege being breached. Lack of consent precludes even judicial review of confidential records. The decision in State v. D'Ambrosia, rather than abrogating the statutory protection, is fully in line with the prior Connecticut cases interpreting Connecticut Gen. Stat. 52-146e.

In numerous cases decided prior to Ritchie, the Connecticut Supreme Court ruled on the basis of the federal confrontation clause that the statute at issue and the privilege it accorded would have to be reconciled with the defendant's right to cross-examine. State v. Esposito, 192 Conn. 166, 471 A.2d 949 (1984); State v. Pierson, 201 Conn. 211, 514, A.2d 724 (1986); State v. Storlazzi, 191 Conn. 453, 458, 464 A.2d 839 (1983). In State v. Kelly, the Connecticut Supreme Court acknowledged this Court's decision in Ritchie and upheld the trial court's denial of access following in camera review, alternatively analyzing access to records under the rubric of discovery decisions. State v. Kelly, 208 Conn. 365, 380-81, 545 A.2d 1048 (1988). Far from rejecting the analytical framework provided by Ritchie, the Connecticut Supreme Court has relied upon it in upholding denial of access to a defendant under the facts of the Kelly case. Whether and to what extent access to records is granted is determined on a case by case basis, limited to the facts of the particular case. State v. Hufford, 205 Conn. 386, 403, 533 A.2d 866 (1987).[4]

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4 Given the individualized determination required, the prosecutor during the trial of the present case requested that the judge secure a waiver and review the records. The court declined as in Ritchie, to inspect the documents; or to secure a waiver.

The procedure authorized by the Connecticut Supreme Court from Storlazzi, supra, thru D'Ambrosia is much the same as that required by this Court in Ritchie. Upon establishing a basis for the claim of materiality, the defendant is entitled only to an in camera judicial review of the records, rather than full disclosure to the defense. Screening by the trial judge, common to both Ritchie and D'Ambrosia, is the method by which the inherent tension between the defendant's rights and the witness' rights is resolved. D'Ambrosia, Pet. App. 9A. Connecticut case law has determined, as has this Court in Ritchie, that the defendant's interest in a fair trial can be protected fully by in camera review of records by the trial court. In State v. D'Ambrosia, the Connecticut Supreme Court has simply required the trial court to allow the respondent defendant the opportunity to attempt to make the requisite threshold showing necessary for in camera judicial review.

C. The due process clause and confrontation clause of the Constitution of the State of Connecticut as well as the federal constitution, justify the decision reached in the present case.

The Connecticut Supreme Court has previously interpreted the same statute and held on independent state grounds that the procedure employed in its decision State v. D'Ambrosia is required by the Connecticut Constitution. State v. Hufford, 205 Conn. 386, at 402, 533 A.2d 866 (1987).

In Hufford, announced eleven months after this Court's decision in Pennsylvania v. Ritchie, the Connecticut Supreme Court specifically held that independent and adequate state

constitutional grounds required the procedure of in camera judicial review upon a sufficient threshold showing, citing Michigan v. Long, 463 U.S. 1032 (1983).

Connecticut General Statutes Section 52-146e provides that disclosure requires the consent of the patient. This state policy as enunciated in the legislation, C.G.S. 52-146e and case law differentiates the respondent's case from that of Ritchie. This Court in Ritchie recognized that state policies regarding confidential records could differ. Ritchie at 58. The policy embodied in both Connecticut case law and the statute requires that the party seeking access to confidential records make a threshold showing of necessity, rather than the automatic review of Ritchie. It is clear from the decision in State v. D'Ambrosia that the Connecticut Supreme Court relies upon both state constitutional and federal constitutional grounds and an analysis of the state statute in determining when the state statutory privileges will be breached.

Concluding its review of precedent bearing on the instant case, the Connecticut Supreme Court stated: "It is of no moment in this case whether a defendant's constitutional right to discredit witnesses by accessing their psychiatric records stems from the sixth amendment's confrontation clause; from the fourteenth amendment's due process clause, as proposed by four justices of the United States Supreme Court ... or from either the confrontation or due process clause of our state constitution." (citations omitted) Pet. App. 9A, fn. 5. In

Michigan v. Long, supra, this Court stated that it would not review a state court decision which was supported by clearly articulated independent state grounds. Therefore, this Court should deny the petition for certiorari.

D. There is no substantial conflict between state court decisions as to the constitutional basis for disclosure of privileged materials or to the degree of disclosure required.

Petitioner claims that the state courts have inconsistently interpreted and applied this Court's opinion in Ritchie. While acknowledging that at least two courts have adopted Ritchie's due process analysis, State v. Perry, 149 Vt. 623, 548 A.2d 408 (1988), and United States v. Johnson, 537 A.2d 555 (D.C. 1988) petitioner maintains that the Supreme Court of Rhode Island analyzed disclosure of confidential records improperly. State v. Kelly, 554 A.2d 632 (R.I. 1989). Although the Rode Island court failed to apply a due process framework, that court clearly held that its decision was justified on the basis of the state constitutional guarantee to confrontation. id. at 635 and 636. The bottom line, however, is that the Rhode Island court reached the same result as that mandated in Ritchie -- judicial in camera review, not wholesale disclosure to the defendant.

Decisions of other states cited by petitioner like wise fail to establish a compelling reason for the granting of the petition for certiorari. In each of the cases cited by petitioner from Illinois, Maine, Minnesota and Massachusetts, Ritchie is applied to the applicable state statute with the same result, a case by

case, statute by statute analysis.[5] The statutes involved, the specificity of requests made, and the facts of the individual cases are the basis for the different results reached, rather than inconsistent applications of Ritchie.

Petitioner cites a Colorado Supreme Court decision preceeding Ritchie as support for the contention that a confrontational analysis leads to inconsistent results. Petitioner's Brief page 13. People v. District Court, 719 P.2d 722 (Colo. 1986). In two cases subsequent to Ritchie, the Colorado Court fo Appeals has held that absent a sufficient offer of proof and a finding of possible necessity, and absent a waiver, no in camera review of records is required. These cases, decided under statutes unlike Ritchie, are factually distinguishable, and are well within Ritchie's analytical framework. People v. Overton, 759 P.2d 772 (Colo. App. 1988); People v. Exline, 775 P.2d 48 (Colo. App. 1988).

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5 State v. Paradee, the Minnesota Supreme Court ruled that the trial court should examine records in camera, revising the Court of Appeals decision giving the defendant full access to records. This reversal was specifically based on this Court's decision in Ritchie. State v. Paradee, 403 N.W.2d 640, 641 (Minn. 1987). The Maine Supreme Judicial Court agreed that the due process clause and confrontation clause of the state and federal constitutions were conceptually identical and required the same result as that reached in Ritchie. State v. Perry, 552 A.2d 545, 547 (Me. 1989). The Massachusetts Supreme Court uses the materiality standard of Ritchie as the basis for defense access to records following judicial in camera review. Commonweath v. Jones, 404 Mass. 339, 535 N.Ed.2d 331 (1989). In People v. Foggy, analyzing a exception to disclosure was contemplated and where the defense request was merely general, the Supreme Court of Illinois denied an in camera inspection of records.

II. THE CONNECTICUT SUPREME COURT IN STATE v. D'AMBROSIA, DID NOT ESTABLISH A NEW STANDARD OR BURDEN OF PROOF FOR THE PRELIMINARY THRESHOLD SHOWING NECESSARY TO INDUCE THE TRIAL COURT TO INSPECT THE RECORDS IN CAMERA.

This Court in Ritchie ruled that the defendant was entitled to a new trial if on remand the trial court determined that the file to be reviewed contained information that would have changed the outcome of his trial, and if the nondisclosure was not harmless beyond a reasonable doubt. Ritchie at 58. In a footnote, this Court quoted from United States v. Valenzuela v. Bernal, which stated a standard that the unavailable evidence was both favorable and material to the defense. Ritchie at 58 fn. 15, quoting United States v. Valenzuela-Bernal, 458 U.S. 858 (1982). "[The Connecticut Supreme Court in D'Ambrosia does] not read Ritchie or Valenzuela - Bernal to require a defendant to make a greater showing than [its] cases have previously required." D'Ambrosia, at Pet. App. 11A fn. 6.

In focusing its decision on the "predicate inquiry" of whether the respondent was afforded a fair opportunity to make the preliminary showing, the Connecticut Supreme Court emphasized that the witness Knous, whose records were sought, was the state's most vital witness. Had his testimony been either discredited or stricken, the D'Ambrosia court could not be certain that the jury would have returned the same guilty verdicts. Pet. App. 14A. Whether or not the trial court will be required to review the records depends upon a further showing by the defendant. The decision by the Connecticut Supreme Court in no way changes the burden respondent is required to meet to

induce the trial court to inspect the records.

The Connecticut Supreme Court, contrary to the position taken by the petitioner, properly weighed the nature of the two applicable privileges. In requiring that a specific threshold showing be made, the Connecticut Court follows the rulings in Ritchie and Valenzuela-Bernal. In requiring witness' consent prior to in camera review or preliminary questioning, the Connecticut Supreme Court follows the state legislative policy embodied in Conn. Gen. Stat. 52-146e.

CONCLUSION

In this case, the opinion of the Supreme Court of the State of Connecticut was consistent with the decision of this Court in Pennsylvania v. Ritchie and justified on independent and adequate state constitutional grounds. For all the foregoing reasons, the respondent respectfully requests this Court to deny the writ.

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